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18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

21 OWEN DIAZ,  
22 Plaintiff,  
23 v.  
24 TESLA, INC. d/b/a TESLA MOTORS, INC.,  
25 Defendant.

Case No. 3:17-cv-06748-WHO

**DEFENDANT'S OBJECTION TO  
PLAINTIFF'S OPENING SLIDES 2-5**

Judge: Hon. William H. Orrick

## **INTRODUCTION**

Tesla objects to Slides 2-5 in Plaintiff's proposed opening slide presentation, attached hereto as **Exhibit A**. These slides contain cherry-picked excerpts of certain limited portions of the Court's preliminary jury instructions. Allowing Plaintiff to use these slides in an opening presentation would be unduly argumentative and would confuse and mislead the jury as to the actual legal standards it will ultimately be required to apply. The Court should preclude Plaintiff from using these slides in his opening presentation.

## **ARGUMENT**

9 Slides 2-5 in Plaintiff's proposed demonstrative slides to use in his opening statement  
10 purport to list certain matters that have been "conclusively determined" in this case. The basis for  
11 these slides is the Court's Preliminary Jury Instructions (Dkt. 419). These slides are improper and  
12 should be stricken.

13 As a threshold matter, Tesla objects to Plaintiff's reference to preliminary jury instructions  
14 in his opening statement as being premature given that the instructions will not have been given to  
15 the jury as of that time and may be nonfinal in certain respects. Tesla further objects that  
16 references to the jury instructions is unduly argumentative for an opening statement that is limited  
17 to advising the jury regarding what the evidence at the trial may show. *See Hynix Semiconductor*  
18 *Inc. v. Rambus Inc.*, 2009 WL 350643, at \*1 (N.D. Cal. Feb. 2, 2008) (“An opening statement is  
19 limited to presenting a guide to the evidence that the parties reasonably believe will be admitted  
20 into evidence.”); *see also Best v. D.C.*, 291 U.S. 411, 415 (1934) (“The opening statement of  
21 counsel is ordinarily intended to do no more than to inform the jury in a general way of the nature  
22 of the action and defense so that they may better be prepared to understand the evidence”). The  
23 only possible relevance of referencing jury instructions is to argue how the jury should apply the  
24 evidence to the law to make a finding, which is improper in an opening statement.

25        But even if Plaintiff were otherwise permitted to rely on preliminary jury instructions in an  
26 opening statement, the manner in which he has done so in Slides 2-5 is improper and misleading  
27 and will be confusing for the jury. For months now, the parties have been painstakingly meeting  
28 and conferring, and addressing with the Court, the highly specific language to use in the jury

1 instructions. The Court has considered the parties' briefing and extensive oral arguments and  
 2 made rulings that have resulted in the current set of preliminary jury instructions. The instructions  
 3 are intended to work together as a unit, and indeed, the jury will be required to consider and apply  
 4 the instructions as whole. Despite this, Plaintiff has cherry picked small portions of certain  
 5 instructions to present to the jury in Slides 2-5. By doing so, he has omitted key language and  
 6 context from the instructions and presented a misleading picture regarding what the instructions  
 7 will actually be.

8 For example, in stating his purported "entitlement" to compensatory and punitive damages,  
 9 Plaintiff neglects to mention that he is only "entitled" to recover "any past or future noneconomic  
 10 damages and any punitive damages that [the jury] may find based on the evidence at trial," and  
 11 that as to both forms of damages, Plaintiff bears "the burden of proving the amount by a  
 12 preponderance of the evidence. Dkt. 419 at Instruction Nos. 2, 10, 12. Likewise, in stating it has  
 13 been determined that Tesla is liable for "[c]reating a hostile work environment based on race,"  
 14 Plaintiff omits to mention that a "single incident can be sufficiently severe or pervasive to  
 15 constitute harassment." Dkt. 419 at Instruction No. 3.

16 Plaintiff's demonstratives further imply the entirety of the case has already been decided  
 17 by listing what "has been conclusively determined," while leaving out the accompanying  
 18 instructions explaining that the jury is here to "determine the amount of the damages award." Dkt.  
 19 419 at Instructions No. 2.

20 Plaintiff exacerbates the problem by implying he is presenting a complete and methodical  
 21 view of the jury instructions. *See* Ex. A at 2-4. For example, Plaintiff lists two statements on his  
 22 "Compensatory Damages" slide while omitting the cautionary statement immediately following  
 23 the portion of the jury instructions he excerpts: "Your award must be based upon evidence and not  
 24 upon speculation, guesswork, or conjecture." Dkt. 419 at Instructions No. 10. In these and other  
 25 ways, Plaintiff's references to the law the jury must apply are materially incomplete and  
 26 inaccurate.

27 Instructing the jury is exclusively the province of the Court. By excerpting certain  
 28 language from preliminary instructions to present to the jury, Plaintiff is trying to usurp that

1 function. *See BP Prod. N. Am., Inc. v. Grand Petroleum, Inc.*, 2021 WL 4482138, at \*1 (N.D.  
 2 Cal. Sept. 30, 2021) (“Lawyers may be hired to assist counsel of record with legal briefing, but  
 3 legal opinions have no place in a jury trial and usurp the role of the judge and jury.”).  
 4 Additionally, the Court should be particularly careful with how the second jury is informed of  
 5 determinations that carry over from the first trial because of the weight this information may carry  
 6 with the second jury. *See, e.g., Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002) (“Juries  
 7 are likely to give disproportionate weight to such findings of fact because of the imprimatur that  
 8 has been stamped upon them by the judicial system.”). The Court should preclude Plaintiff from  
 9 displaying his incomplete and misleading depiction of selected portions of certain preliminary jury  
 10 instructions in his opening demonstratives, and exclude Slides 2-5.

11 **CONCLUSION**

12 For the foregoing reasons, Tesla respectfully requests that the Court preclude Plaintiff from  
 13 showing Slides 2-5 during opening statements.  
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15 DATED: March 24, 2023

By: */s/ Daniel C. Posner*

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